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3
4 UNITED STATES DISTRICT COURT
5 DISTRICT OF NEVADA

6 * * *

7 WENDELL DWAYNE O'NEAL,

8 Plaintiff(s),

9 v.

10 EMPIRE FIRE & MARINE INSURANCE
11 COMPANY, INC., et al.,

12 Defendant(s).

Case No. 2:16-CV-2313 JCM (CWH)

ORDER

13
14 Presently before the court is plaintiff Wendell Dwayne O'Neal's motion to set aside this
15 court's order on plaintiff's motion for reconsideration. (ECF No. 165). Defendants Empire Fire
16 and Marine Insurance Co., Zurich Insurance Company, Inc., California Roadrunner Rentals, Inc.,
17 Cisneros & Marias Esq., David (LNU), Anthony Adams, Cymbalista Boaz, Tricia Green, Carol
18 Millaud, Janet Pancoast, Ruder Ruderhausen, Jaime Santos, and Matthew Wolf (collectively,
19 defendants) have not filed a response, and the time for doing so has since passed

20 Also before the court is defendants' motion to designate plaintiff a vexatious litigant. (ECF
21 No. 168). Plaintiff filed a response (ECF No. 169), to which defendants replied (ECF No. 171).

22 Also before the court is plaintiff's *ex parte* "motion for indicative ruling" regarding a
23 memorandum plaintiff filed in support of his motion to set aside. (ECF No. 172).

24 **I. Background and discussion**

25 *a. Plaintiff's motion to set aside*

26 On October 13, 2017, the court granted defendants' motion to dismiss, thereby dismissing
27 plaintiff's fourth amended complaint. (ECF No. 154). On December 19, 2017, the court denied
28 plaintiff's motion to reconsider the court's order granting defendants' motion to dismiss. (ECF

1 No. 163). Plaintiff now requests the court set aside its order denying plaintiff's motion for
2 reconsideration. (ECF No. 165).

3 As an initial matter, the court acknowledges that the complaint was filed *pro se* and is
4 therefore held to less stringent standards. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (“A
5 document filed *pro se* is to be liberally construed, and a *pro se* complaint, however inartfully
6 pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers.”)
7 (internal quotations and citations omitted). However, “*pro se* litigants in the ordinary civil case
8 should not be treated more favorably than parties with attorneys of record.” *Jacobsen v. Filler*,
9 790 F.2d 1362, 1364 (9th Cir. 1986).

10 As defendants note, plaintiff's current motion effectively asks the court to reconsider the
11 court's order denying plaintiff's original motion to reconsider. Plaintiff's current motion does not
12 demonstrate any legal or factual grounds for this court to reconsider its ruling on the original
13 motion or its ruling on the motion to reconsider. Accordingly, the court will deny plaintiff's
14 motion.

15 *b. Defendants' motion to designate plaintiff a vexatious litigant*

16 Defendants request that this court designate plaintiff a vexatious litigant. (ECF No. 168).
17 Defendants note that plaintiff has brought 108 cases in federal district courts, courts of appeals,
18 and county courts as a *pro se* litigant. *Id.* “All of those filings were dismissed[,] with some
19 dismissed by the court acting *sua sponte*.” *Id.* On April 19, 2017, the Eighth Judicial District
20 Court of Nevada designated plaintiff a vexatious litigant. *Id.*; *see* (ECF No. 168-1).

21 *i. Legal standard*

22 The All Writs Act, 28 U.S.C. § 1651(a), empowers federal district courts to enjoin
23 vexatious litigants who have a history of abusing the court's limited resources. *See Ringgold-*
24 *Lockhart v. Cty. of Los Angeles*, 761 F.3d 1057, 1061 (9th Cir. 2014) (citing *De Long v. Hennessey*,
25 912 F.2d 1144, 1147 (9th Cir. 1990)). Under the All Writs Act, a district court can order a person
26 with lengthy histories of abusive litigation—a vexatious litigant—to obtain leave of the court
27 before filing any future lawsuits. *See Molski v. Evergreen Dynasty Corp.*, 500 F.3d 1047, 1057
28 (9th Cir. 2007) (citing 28 U.S.C. § 1651(a)).

1 Flagrant abuse of the judicial process cannot be tolerated because it “enables one person to
2 preempt the use of judicial time that properly could be used to consider the meritorious claims of
3 other litigants.” *See Molski*, 500 F.3d at 1057 (quoting *DeLong*, 912 F.2d at 1148). Vexatious
4 litigant orders, however, are an extreme remedy, and should rarely be entered. “[T]he right of
5 access to the courts is a fundamental right protected by the Constitution.” *See Ringgold-Lockhart*,
6 761 F.3d at 1061 (quoting *Delew v. Wagner*, 143 F.3d 1219, 1222 (9th Cir. 1998)). And restricting
7 that access is a serious matter. *Id.* (“The First Amendment ‘right of the people ... to petition the
8 Government for a redress of grievances,’ which secures the right to access the courts, has been
9 termed ‘one of the most precious of the liberties safeguarded by the Bill of Rights.’” (quoting *BE*
10 *& K Const. Co. v. NLRB*, 536 U.S. 516, 524-25 (2002))); *see also Christopher v. Harbury*, 536
11 U.S. 403, 415 n.12 (2002) (noting that the Supreme Court has located the court access right in the
12 Privileges and Immunities clause, the First Amendment petition clause, the Fifth Amendment due
13 process clause, and the Fourteenth Amendment equal protection clause); *Moy v. United States*, 906
14 F.2d 467, 470 (9th Cir. 1990) (comparing the profligate use of pre-filing orders to restrict the
15 vexatious litigant’s right of access to the courts to hanging a “Sword of Damocles ... over his
16 hopes for federal access for the foreseeable future.”).

17 Out of regard for the constitutional underpinnings of this right, pre-filing orders should be
18 filed only if district courts comply with certain procedural and substantive requirements. *See De*
19 *Long*, 912 F.2d at 1147. When district courts seek to declare a litigant vexatious and impose pre-
20 filing restrictions, they must: (1) provide litigants with notice and an opportunity to oppose the
21 order before it is entered; (2) compile an adequate record for appellate review, including “a listing
22 of all the cases and motions that led the district court to conclude that a vexatious litigant order
23 was needed”; (3) make substantive findings of frivolousness or harassment; and (4) tailor the order
24 narrowly so as “to closely fit the specific vice encountered.” *See Ringgold-Lockhart*, 761 F.3d at
25 1062 (citing *De Long*, 912 F.2d at 1147-48).

26 The first two factors, providing litigants with adequate notice and an opportunity to be
27 heard and compiling an adequate record for appellate review, are procedural requirements. *Id.*
28 (citing *Molski*, 500 F.3d at 1058); *Pac. Harbor Capitol Inc. v. Carnival Airlines, Inc.*, 210 F.3d

1 1112, 1118 (9th Cir. 2000) (finding “an opportunity to be heard does not require an oral or
2 evidentiary hearing on the issue ... [t]he opportunity to brief the issue fully satisfies due process
3 requirements”). To the contrary, the “latter two factors ... are substantive considerations ... [that]
4 help the district court define who is, in fact, a ‘vexatious litigant’ and construct a remedy that will
5 stop the litigant’s abusive behavior while not unduly infringing the litigant’s right to access the
6 courts.” *Id.* In “applying the two substantive factors,” to determine “whether a party is a vexatious
7 litigant and whether a pre-filing order will stop the vexatious litigation or if other sanctions are
8 adequate,” the Ninth Circuit has held that a separate set of considerations provides “a helpful
9 framework,” including:

10 (1) the litigant’s history of litigation and in particular whether it entailed vexatious,
11 harassing or duplicative lawsuits; (2) the litigant’s motive in pursuing the litigation,
12 *e.g.*, does the litigant have an objective good faith expectation of prevailing?; (3)
13 whether the litigant is represented by counsel; (4) whether the litigant has caused
needless expense to other parties or has posed an unnecessary burden on the courts
and their personnel; and (5) whether other sanctions would be adequate to protect
the courts and other parties.

14 *Id.*

15 Ultimately, in deciding whether or not to restrict a litigant’s access to the courts, the
16 question the court must answer is “whether a litigant who has a history of vexatious litigation is
17 likely to continue to abuse the judicial process and harass other parties.” *See Molski*, 500 F.3d at
18 1058 (quoting *Safir v. United States Lines, Inc.*, 792 F.2d 19, 23 (2nd Cir. 1986)).

19 *ii. Discussion*

20 This case is another example of plaintiff frivolously attempting to represent the interests of
21 third parties as a *pro se* litigant. After the Eighth Judicial District Court declared plaintiff a
22 vexatious litigant, he turned to federal court to continue pursuing baseless claims. In this case, he
23 has filed numerous frivolous motions that have unnecessarily delayed the proceedings. Further,
24 defendants’ motion lists numerous frivolous lawsuits filed by plaintiff in this court and others, with
25 examples of duplicative lawsuits based on the same factual allegations. *See* (ECF No. 168 at 3, 8-
26 10).

27 The court has provided plaintiff an opportunity to be heard via plaintiff’s responsive filings,
28 and holds that plaintiff is likely to continue to abuse the judicial process. *See Molski*, 500 F.3d at

1 1058. The court will grant defendants' motion, and will designate plaintiff as a vexatious litigant
2 pursuant to 28 U.S.C. § 1651(a).

3 **II. Conclusion**

4 Accordingly,

5 IT IS HEREBY ORDERED, ADJUDGED, and DECREED that plaintiff's motion to set
6 aside (ECF No. 165) be, and the same hereby is, DENIED.

7 IT IS FURTHER ORDERED that defendants' motion to designate plaintiff a vexatious
8 litigant (ECF No. 168) be, and the same hereby is, GRANTED.

9 IT IS FURTHER ORDERED that plaintiff's "motion for indicative ruling" (ECF No. 172)
10 be, and the same hereby is, DENIED.

11 IT IS FURTHER ORDERED that plaintiff is deemed a vexatious litigant under 28 U.S.C.
12 § 1651(a), and he is **ENJOINED and PROHIBITED** from filing any new complaint, petition, or
13 other action in this court without first obtaining leave from the chief judge of this court. The clerk
14 of court is authorized to reject, refuse to file, and discard any new complaint, petition, or other new
15 action in violation of this order.

16 DATED April 4, 2018.

17 
18 UNITED STATES DISTRICT JUDGE